

# COMMENTS

## LABOR AGREEMENTS—IMPLIED LIMITATIONS ON PLANT REMOVAL AND RELOCATION

THE LEGALITY of removing a firm's plant and equipment was unlikely to be challenged a decade ago, absent a clause in the employer's collective bargaining agreement specifically prohibiting such action. Within recent years, however, labor unions have frequently urged arbitrators and courts<sup>1</sup> to find substantial implied restrictions, as a matter of contract law, on the right of a firm unilaterally to remove its plant facilities and operations.

Historically, interpretation of labor agreements was guided by the "reserved rights" theory which held that management retains all rights and functions relating to the operations of the enterprise except as specifically limited by the collective bargaining agreement. This view now finds little support in the removal cases,<sup>2</sup> and paralleling its demise has been the ascendancy of the "implied limitations" theory.<sup>3</sup> This theory originated in arbitration cases involving subcontracting,<sup>4</sup> where it became well established that inter-company work movements may be restricted by implied terms in the labor agreement.<sup>5</sup> In view of their substantial victories in this field, it

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<sup>1</sup> The scope of judicial review of labor arbitration awards is not a subject of this comment. These court decisions considered herein arise when there is no provision for arbitration in the collective bargaining agreement.

<sup>2</sup> The quiescence of the reserved rights theory in removal cases is apparently paralleled in the subcontracting area. Dash, *The Arbitration of Subcontracting Disputes*, in *Symposium: Management Rights and Labor Arbitration*, 16 *IND. & LAB. REL. REV.* 208, 214 (1963); Greenbaum, *The Arbitration of Subcontracting Disputes: An Addendum*, 16 *IND. & LAB. REL. REV.* 221, 229 (1963). See, however, the discussion of the *Stetson* case, note 36 *infra*.

<sup>3</sup> Subcontracting is engaging an outside organization to manufacture products or perform services which could be manufactured or performed by the firm's own bargaining unit employees using the firm's own facilities.

<sup>4</sup> See Dash, *supra* note 2; Greenbaum, *supra* note 2.

<sup>5</sup> Although the implied limitations theory is chiefly a tool of labor, management has attempted to utilize the same type of reasoning. In *American Mach. & Foundry Co.*, 16 *Lab. Arb.* 95 (1950), the company claimed that despite an explicit provision declaring that removal would not alter the bargaining unit, the union had not objected to transfers beyond the jurisdiction of the unit in the past. The arbitrator held, however, that the union was not bound by its prior acquiescence and that the words of the agreement must control. *Id.* at 96-97. Compare text accompanying notes 69-72 *infra*.

The Supreme Court, moreover, while recognizing the validity of finding implied terms in labor agreements, made no attempt to restrict that practice to findings in

was not unexpected that unions should attempt to utilize the implied limitations theory to protect their members from economic loss due to plant transfer or removal.<sup>6</sup>

This comment considers the law relating to implied limitations on plant removal in two basic fact situations: (1) where it is alleged that removal is itself a breach of contract; and (2) where the union has asserted rights vis-à-vis the employer at the new site of operations after removal has been accomplished.<sup>7</sup> Although it is only in the latter situations that union success has been substantial, the implied limitations theory has become increasingly important in both areas, and future decisions favorable to the unions can reasonably be expected.

#### REMOVAL AS A BREACH OF THE COLLECTIVE BARGAINING AGREEMENT

##### *Construction of the Contract*

###### A. Recognition clause.

Unions have argued with some success that the recognition clause<sup>8</sup> bars a firm from subcontracting work normally performed by bargaining unit employees.<sup>9</sup> It is reasoned that the recognition

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favor of labor when it sanctioned an extension of the arbitrator's source of law to extra-contractual factors. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-82 (1960).

<sup>6</sup> From the point of view of employers, one "difficulty with the implied limitations theory is that it proves too much. . . . [I]t applies with equal logic to every area of management conduct." Lindau, *Comment*, 16 *IND. & LAB. REL. REV.* 215, 217 (1963).

<sup>7</sup> The cases considered herein are not limited to those in which the firm's entire operations have been removed. Not treated, however, are cases clearly involving breach of express terms of the contract. See, e.g., *Dubinsky v. Blue Dale Dress Co.*, 162 Misc. 177, 292 N.Y. Supp. 898 (S. Ct. 1936); *Jack Meilman*, 34 *Lab. Arb.* 771 (1960).

The question of whether and to what extent a firm is obligated to negotiate with the union concerning removal or relocation is beyond the scope of this comment. See Goetz, *The Duty to Bargain About Changes in Operations*, 1964 *DUKE L.J.* 1; Wollett, *The Duty to Bargain Over the "Unwritten" Terms and Conditions of Employment*, 36 *TEXAS L. REV.* 863 (1953); *Comment, Employer's Duty to Bargain About Subcontracting and Other "Management" Decisions*, 64 *COLUM. L. REV.* 294 (1964).

<sup>8</sup> The recognition clause is a declaration that the employer recognizes the union to be the exclusive representative of the employees covered by the contract for the purpose of collective bargaining.

<sup>9</sup> E.g., *A. D. Julliard Co.*, 21 *Lab. Arb.* 713 (1953). The recognition clause has been held to bar work movements of other kinds, such as the allocation of union work to non-union supervisors. *Lear, Inc.*, 20 *Lab. Arb.* 681 (1953); cf. *Joseph S. Finch & Co.*, 41 *Lab. Arb.* 883 (1963). On the other hand, there are numerous awards holding that the recognition clause does not prevent the employer from subcontracting. E.g., *Celotex Corp.*, 40 *Lab. Arb.* 554 (1963); *Black-Clawson Co.*, 34 *Lab. Arb.* 215 (1960).

clause is intended not merely to designate or specify the bargaining unit, but that it also implies a promise that the size of that unit will not be reduced by management's unilateral decision to remove work customarily performed within the unit. In two removal cases, this contention has been dismissed without discussion.<sup>10</sup> In another case, however, the arbitrator stated that the recognition clause was evidence which, although not in itself conclusive, tended to show that a prohibition on removal was intended.<sup>11</sup>

#### B. Work protection clause.

*Selb Mfg. Co.*<sup>12</sup> is the only case in which a clause prohibiting subcontracting was relied upon by the arbitrator in characterizing removal as a breach of contract.<sup>13</sup> It is noteworthy that in a number of other cases, work protection clauses far broader in scope than the one in *Selb* have been held not to prohibit removal. In *Linde Co.*,<sup>14</sup> for example, the contract provided that

employees outside of the bargaining unit will not perform such work as is customarily performed by the employees in the bargaining unit to the extent that the earning opportunity of the latter group is affected adversely [except in case of emergency].<sup>15</sup>

The award noted that the transfer giving rise to the grievance was motivated by pressing economic considerations, and that the evidence indicated that the clause was originally inserted as a result of the employer's allocation of unit work to supervisory employees. While recognizing that the clause related to situations other than supervisory personnel doing unit work, the arbitration board held that it

<sup>10</sup> *Linde Co.*, 40 Lab. Arb. 1073 (1963); *Celanese Corp. of America*, 23 Lab. Arb. 685 (1954).

<sup>11</sup> *Curtiss-Wright Corp.*, 43 Lab. Arb. 5 (1964). See text accompanying footnotes 51-53 *infra*; cf. *Safeway Stores, Inc.*, 43 Lab. Arb. 357 (1964). But see *Air Prods. & Chems., Inc.*, 39 Lab. Arb. 807 (1962), involving a grievance arising from the transfer of hauling operations from one division covered by the contract in issue to another division of the company covered by a contract with a different union. In denying the grievance the arbitrator stated that "each provision in a labor agreement is always subject to limitation by other provisions. . . . If strong and rather remote implications are to be read into the Recognition provisions would not consistency require that implications also be read into the Management Rights provision." *Id.* at 811.

<sup>12</sup> 37 Lab. Arb. 834 (1961), *enforced*, 49 L.R.R.M. 2366 (E.D. Mo. 1961), *aff'd*, 305 F.2d 177 (8th Cir. 1964).

<sup>13</sup> Compare text accompanying notes 54-55 *infra*.

<sup>14</sup> 40 Lab. Arb. 1073 (1963).

<sup>15</sup> *Id.* at 1075.

could not "remotely be interpreted" to deprive the company of the power to build and utilize plants at new locations.<sup>16</sup>

In *UAW, Local 408 v. Crescent Brass & Pin Co.*<sup>17</sup> the union sought to enjoin contemplated removal for the duration of the contract, relying on a work protection clause which provided that any manufacturing to be performed by the company during the contract term should not be performed "in any other plant in which any officials or owners of this company have an interest."<sup>18</sup> Elsewhere, however, the agreement provided that the employer should have "the right to decide the number and location of plants," and that if the company should move its plant or operations, the contract should remain in effect.<sup>19</sup> The court invoked the canon of construction that all terms of a contract must, if possible, be given effect; it found for the employer, reasoning that if the union should prevail, the provision giving the company the right to determine the number and location of plants would be transgressed, and the clause providing for the continued effectiveness of the contract in case of removal would be rendered superfluous. The court's employment of this canon of construction seems to be of dubious propriety, however, because it appears to render the work protection clause meaningless.<sup>20</sup>

### C. Management rights clause.

The effect to be given a management rights clause has been expressly at issue in relatively few removal cases. As previously

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<sup>16</sup> *Id.* at 1078.

<sup>17</sup> 46 L.R.R.M. 3015 (E.D. Mich. 1960).

<sup>18</sup> *Id.* at 3017.

<sup>19</sup> The relevant section of the contract was construed in *UAW v. Crescent Brass & Pin Co.*, 46 L.R.R.M. 2975 (E.D. Mich. 1960).

<sup>20</sup> See text accompanying note 18 *supra*. No explanation was made as to what effect the decision gave to the work protection clause. The court did, however, note that the contract "used the words 'In any other plant.'" *Id.* at 3017. Perhaps, therefore, the decision is to be read as holding that the plant to be built at the new location would be the same plant as the one at the old location. See *Oddie v. Ross Gear & Tool Co.*, 195 F. Supp. 826 (E.D. Mich. 1961), *rev'd*, 305 F.2d 143 (6th Cir. 1962), where it was asserted that a plant remains the same plant wherever it is moved. If this was not the court's holding in *Crescent Brass & Pin*, however, then the use of the canon of construction invoked appears impossible.

Compare *Automobile Workers v. Ford Motor Co.*, 32 L.R.R.M. 2344 (E.D. Mich. 1953); *Metal Textile Corp.*, 42 Lab. Arb. 107 (1964); *United States Steel Corp.*, 36 Lab. Arb. 940 (1961); *Facile Corp.*, 18 Lab. Arb. 781 (1952). The *United States Steel* case held that a clause requiring the maintenance of local working conditions does not, "in the absence of some clear and unequivocal agreement on the subject," preclude the employer from performing given types of work at one plant rather than another. 36 Lab. Arb. at 941.

noted, the clause was construed to permit transfer of operations in the *Crescent Brass & Pin* case,<sup>21</sup> despite the existence of an ostensibly conflicting work protection clause. In *Celanese Corp. of America*,<sup>22</sup> the arbitrator stated that the decision to transfer "relates to 'management of the plant' and 'direction of the working force and plant operations',"<sup>23</sup> functions expressly reserved to the company in the management rights clause. In addition, it was noted that the decision to remove seemed to be authorized by two other provisions, one giving the company the right to furlough employees if production was temporarily not necessary at the plant designated in the contract, the other defining "management" as including the right to lay off or recall employees in connection with any reduction or increase in the working force.<sup>24</sup>

Except for these two cases, management rights clauses have had little significance in the resolution of disputes over removal.<sup>25</sup> A possible explanation of this fact may be that such provisions are often too general to be of assistance in applying the contract to the facts of the dispute.<sup>26</sup> A proponent of the "management" view has stated that his idea of a "good clause" would be as follows: "All functions not limited by this agreement, and then only to the extent limited, are retained exclusively by the company."<sup>27</sup> But another commentator has noted that in some industries the chances of such an agreement being adopted would be indeed slim.<sup>28</sup> The give and take of the bargaining process may thus preclude the utilization of

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<sup>21</sup> See notes 17-20 *supra* and accompanying text.

<sup>22</sup> 23 Lab. Arb. 685 (1954).

<sup>23</sup> *Id.* at 687.

<sup>24</sup> *Ibid.* The arbitrator's decision was buttressed by evidence in the bargaining history tending to show that the management rights clause had been inserted in the contract to cover contingencies such as subcontracting and removal. However, the arbitrator noted that the clauses referred to did not give the company absolute freedom of action; good faith on the company's part was held to be "of prime consideration." *Id.* at 690.

<sup>25</sup> In *Automobile Workers v. Ford Motor Co.*, 32 L.R.R.M. 2344 (E.D. Mich. 1953) and *Linde Co.*, 40 Lab. Arb. 1073 (1963) the presence of a management rights clause was cited as one reason for the decision in favor of the employer; the weight accorded these clauses, however, was apparently slight.

<sup>26</sup> Lack of specificity seems to have occasioned the statement of the arbitrator in *Air Prods. & Chems., Inc.*, quoted in note 11 *supra*.

<sup>27</sup> Doolan, *Reserved Rights in Labor Arbitration: A Management View*, N.Y.U. 12TH ANNUAL CONFERENCE ON LABOR 211, 213 (1959).

<sup>28</sup> Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1010 (1955). Due to the recent acceptance of the implied limitations theory, moreover, unions would probably be more reluctant now than in 1955 to accept any contractual recognition of the reserved rights theory.

a device which at first glance would seem to provide a means of clarifying the intent of the parties.

#### D. Other clauses.

Occasional union contentions that implied limitations on removal follow from the existence of certain other contractual clauses have met with little success. Thus, the argument that a collective bargaining contract of a stated *duration* carries with it an implied promise by the employer that employment will not be reduced during the term of the contract has been rejected in several cases.<sup>29</sup> Similarly, no removal case has held that the description of *job classifications* imports a guarantee that those jobs shall always be filled,<sup>30</sup> although a contrary result has been reached in some subcontracting cases.<sup>31</sup>

In enforcing the *Selb* arbitration award,<sup>32</sup> the district court stated perfunctorily that the existence of the *seniority* provisions would alone have sufficed to sustain the award.<sup>33</sup> The court apparently believed that a seniority provision not only entitles employees to seniority rights, but also empowers them to demand that they enjoy those rights exclusively at the plant designated in the contract. This view seems unfounded and has been rejected by two other federal courts.<sup>34</sup>

#### E. The entire contract.

Rather than relying on a particular contract term to block removal, a union may assert that its agreement is "instinct with an

<sup>29</sup> *Fraser v. Magic Chef-Food Giant Mkts., Inc.*, 324 F.2d 853 (6th Cir. 1963); *Sivyer Steel Casting Co.*, 39 Lab. Arb. 449 (1962); *John B. Stetson Co.*, 28 Lab. Arb. 514 (1957).

<sup>30</sup> *Johns Manville Fiber Glass, Inc.*, 38 Lab. Arb. 620 (1961); *Weyerhaeuser Co.*, 37 Lab. Arb. 308 (1961). *But see Safeway Stores, Inc.*, 42 Lab. Arb. 353 (1964), wherein it was suggested that job description and classification clauses might prohibit removal if there were some affirmative evidence, such as in the parties' practice or bargaining history, that the parties intended those clauses to have such an effect. *Id.* at 357.

<sup>31</sup> *Continental Can Co.*, 29 Lab. Arb. 67 (1956); *Parke, Davis & Co.*, 15 Lab. Arb. 111 (1950).

<sup>32</sup> See text accompanying notes 12-13 *supra*, and text accompanying notes 54-55 *infra*.

<sup>33</sup> *IAM v. Selb Mfg. Co.*, 49 L.R.R.M. 2366, 2368 (E.D. Mo. 1961), *aff'd*, 305 F.2d 177 (8th Cir. 1962).

<sup>34</sup> *Auto Workers v. Federal Pac. Co.*, 36 L.R.R.M. 2357, 2358 (D. Conn. 1955); *Automobile Workers v. Ford Motor Co.*, 32 L.R.R.M. 2344 (E.D. Mich. 1953). *But see Safeway Stores, Inc.*, 42 Lab. Arb. 353 (1964), wherein it was suggested that the existence of seniority provisions might prohibit removal if there were some affirmative evidence that the parties intended those provisions to have such an effect. *Id.* at 357.

obligation" on the employer's part to take no action which will frustrate the agreement's basic purposes.<sup>35</sup> From labor's point of view, one basic purpose of collective bargaining contracts is to ensure employment opportunity and security. Clearly, that purpose is frustrated even by removal motivated solely by economic considerations. The legitimate purposes of management, however, may be frustrated by the inability to transfer its operations. Hence recognition that a contract is "instinct with an obligation" does not necessarily compel a decision for the union. Moreover, obligations which might be encompassed by the "instinct obligation" doctrine can be modified by express terms in the contract. Thus, in the two removal cases in which the doctrine was explicitly recognized the arbitrator did not feel bound to hold for the union.<sup>36</sup>

#### F. Omission.

That intent may be inferred from what is omitted from a contract, as well as from what is included, is scarcely novel reasoning. Only in *Automobile Workers v. Ford Motor Co.*,<sup>37</sup> however, was the omission of a clause prohibiting removal expressly held to be conclusive proof that such a prohibition was not intended.<sup>38</sup> A number of arbitration cases have considered omission as some evidence, inconclusive in itself, that a proscription on removal was not intended.<sup>39</sup>

<sup>35</sup> "A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed. . . ." *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91, 118 N.E. 214 (1917) (Cardozo, J.).

<sup>36</sup> *Air Prods. & Chems., Inc.*, 39 Lab. Arb. 807 (1962); *Celanese Corp. of America*, 23 Lab. Arb. 685 (1954).

*John B. Stetson Co.*, 28 Lab. Arb. 514 (1957), is a case in which the arbitrator purported not to be persuaded by the argument that the contract was instinct with an obligation to preserve its subject matter. The arbitrator stated that "the authority of the Company to make business decisions is limited only as the agreement expressly limits it. This is the settled law of collective bargaining agreements." *Id.* at 517. Nevertheless, the arbitrator directed the company to provide a fund for severance pay and moving expenses, to employ at the new location all former employees, and to distribute accrued pension funds and grant accrued vacation benefits, apparently for the sole reason that he considered the company's unilateral decision to remove to be "unwise" and "morally wrong." *Id.* at 517-19.

<sup>37</sup> 32 L.R.R.M. 2344 (E.D. Mich. 1935).

<sup>38</sup> In the *Automobile Workers* case it was stated that inclusion of an express prohibition on removal would have been a simple matter and hence failure to do so in an otherwise comprehensive agreement must mean that it was not intended. The court noted that the employees "do not claim that their bargaining representatives were so naive and inexperienced as to have suffered the . . . [company] to talk them out of including such a condition in the contract on the grounds that it was unnecessary to have it in there." *Id.* at 2351.

<sup>39</sup> *Curtiss-Wright Corp.*, 43 Lab. Arb. 5 (1964); *Linde Co.*, 40 Lab. Arb. 1073, 1079

*Extra-contractual Factors*

## A. Past practice and bargaining history.

In a concurring opinion, Mr. Justice Brennan has observed that Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial selfgovernment, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion.<sup>40</sup>

It is accordingly accepted by courts and arbitrators that a reliable indication of intent may often be found in evidence of both the past practice of the parties and the bargaining history, not only of the contract being construed, but also of prior contracts.

In *Metal Textile Corp.*,<sup>41</sup> for example, a provision purporting to prohibit "letting out" of either maintenance or production work where the effect would be "either to reduce the normal work week . . . or to cause a layoff"<sup>42</sup> was held not to preclude removal of a line of the company's production from New Jersey to Mississippi. The arbitrator noted that the term "let out" was definitive neither within the firm nor throughout the industry. He found that inclusion of the disputed provision twelve years earlier had been motivated by concern over the possibility of subcontracting maintenance work, and that there was no evidence that such removal as had here occurred had been contemplated by the parties. Moreover, developments subsequent to insertion of the clause tended to support this conclusion. For example, when a move had been rumored in 1958 the union had asked only to discuss severance pay and had not invoked the clause now in issue.<sup>43</sup>

The interpretative technique of inquiring into past practice and bargaining history has inured greatly to the benefit of employers.<sup>44</sup>

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(1963); *United States Steel Corp.*, 36 Lab. Arb. 940, 941 (1961); *Celanese Corp. of America*, 23 Lab. Arb. 685, 687 (1954).

<sup>40</sup> *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (concurring opinion).

<sup>41</sup> 42 Lab. Arb. 107 (1964).

<sup>42</sup> *Id.* at 108.

<sup>43</sup> *Id.* at 109-10.

<sup>44</sup> Other cases in which bargaining history was considered include *Safeway Stores, Inc.*, 42 Lab. Arb. 353, 355 (1964); *Linde Co.*, 40 Lab. Arb. 1073, 1078 (1963); *Celanese Corp. of America*, 23 Lab. Arb. 685, 689 (1954); *Facile Corp.*, 18 Lab. Arb. 781, 783-84 (1952). Past practice of the parties was examined in *Safeway Stores, Inc.*, *supra* at 354, 356; *Air Prods. & Chems., Inc.*, 39 Lab. Arb. 807 (1962); *Weyerhaeuser Co.*, 37 Lab. Arb. 308, 312-13 (1961); *Celanese Corp. of America*, *supra* at 688. Decision in every case was for the employer.

That the constructions urged by the unions have often appeared somewhat novel no doubt accounts in large measure for this fact; but as the implied limitations theory gains increasing recognition in other areas, past practice and bargaining history may be expected to weigh more heavily in labor's favor.<sup>45</sup>

### B. Employer's motive.

According to two recent studies, in only fifteen of one hundred and fifteen cases considered did the arbitrator, in deciding whether or not subcontracting constituted a violation of the labor contract, fail to inquire as to whether the decision was made in good faith, whether it was dictated by reasons of economic efficiency, or whether it was unreasonable, arbitrary, discriminatory or intended to harm or undermine the union.<sup>46</sup> The same considerations have been deemed important in removal cases.

In *Celanese Corp. of America*<sup>47</sup> other factors were accorded far more extensive treatment,<sup>48</sup> but good faith was held to be "of prime consideration" in upholding the company's decision to remove. Similarly, while other considerations helped shape the decision in *Linde Co.*,<sup>49</sup> the arbitrator emphasized that there was no anti-union purpose, that management flexibility was a necessity under the circumstances, and that to sustain the grievance would seriously have jeopardized the company's competitive position.<sup>50</sup>

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<sup>45</sup> Thus, ten years ago an arbitrator might have had little difficulty in finding that a recognition clause implied no limitation on removal. Now, however, the question has been raised frequently enough so that most if not all labor and management negotiators are aware of the limitations that a recognition clause may imply, and it may be impossible to say that neither side, in renegotiating an agreement, considered the cause to imply such a limitation.

<sup>46</sup> See Dash, *supra* note 2, at 210, 212-13; Greenbaum, *supra* note 2, at 224-25. Greenbaum's conclusion was that, absent an express contractual provision, "arbitrators will decide an employer may contract out as a management function . . . provided the employer has made a reasonable business decision in good faith without intent to undermine the union. . . . The matter boils down to how arbitrators interpret the phrases 'a reasonable business decision,' 'good faith,' and 'intent to undermine.'" *Id.* at 234. It would seem more likely that the "reasonableness" of the business decision is merely evidence of an intent or lack of intent to harm or undermine the union, than that labor agreements are construed to contain an implied term that union employees cannot be made to suffer by a decision which is unreasonable purely from a business point of view.

<sup>47</sup> 23 Lab. Arb. 685 (1954).

<sup>48</sup> The arbitrator cited past practice, bargaining history, the scope of the management rights provisions, and the lack of any express limitation as reasons favoring the company's position. *Id.* at 687-88. See notes 21-45 *supra* and accompanying text.

<sup>49</sup> See notes 25, 44, and text accompanying notes 14-16 *supra*.

<sup>50</sup> 40 Lab. Arb. 1073, 1077-78 (1963).

In *Curtiss-Wright Corp.*<sup>51</sup> the union contended that "the fundamental principle of contract law is that hardship, economic or otherwise, is not a sufficient excuse for the failure to comply with the terms of an agreement."<sup>52</sup> With evident impatience, the arbitrator noted that fundamental differences between a labor agreement and an ordinary single-transaction contract can preclude application of the same rules of construction to both kinds of agreements. A labor contract "must be construed, interpreted and applied with due consideration of its purposes and objectives,"<sup>53</sup> and where the failure to remove plant facilities would probably entail failure of the business, such a move could not violate the contract.

In *Selb Mfg. Co.*, removal was held to violate a clause which ostensibly barred only subcontracting. However, it may be significant that following its apparently unique assertion that the "clear language"<sup>54</sup> of the subcontracting clause prohibited removal, the board further stated

[W]e believe a Company may discontinue in whole or in part a totally unprofitable operation; we do not believe that a Company may avoid an agreement or any part thereof by moving such operations [merely] *in order to increase the degree of profitability*. If this could be done, such clauses or agreements would mean very little.<sup>55</sup>

Although the employer's motive has frequently been a subject of inquiry in removal cases, it is difficult to generalize with respect to its significance. It is clear that a decision to remove which was motivated solely to destroy the union constitutes an unfair labor practice.<sup>56</sup> The decisions, however, are amenable to diverse interpretation because of the flexibility of such criteria as "good faith" or "valid economic motives."<sup>57</sup>

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<sup>51</sup> 43 Lab. Arb. 5 (1964).

<sup>52</sup> *Id.* at 7.

<sup>53</sup> *Ibid.*

<sup>54</sup> 37 Lab. Arb. at 843.

<sup>55</sup> *Ibid.* (Emphasis added.) *But cf.* Air Prods. & Chems., Inc., 39 Lab. Arb. 807, 811 (1962) where it was held that "in transfer of work cases a little more consideration is given . . . to management's needs for efficient operation."

<sup>56</sup> Assuming that an anti-union motive were so established, the employer would have violated § 8(a)(3) of the Taft-Hartley Act which prohibits discrimination against employees with regard to hire or tenure. Labor-Management Relations Act § 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958). See, e.g., *NLRB v. Preston Feed Corp.*, 309 F.2d 346, 350, 352 (4th Cir. 1962); Goetz, *The Duty to Bargain About Changes in Operations*, 1964 DUKE L.J. 1, 2-3.

<sup>57</sup> For other cases in which the employer's motive was considered, see *Plywood Workers Union v. International Paper Co.*, 46 L.R.R.M. 2859 (D. Ore. 1960); *Safe-*

SURVIVAL OF COLLECTIVE BARGAINING  
CONTRACT RIGHTS AFTER REMOVAL

A firm which succeeds in removing its operations without being held to violate its collective bargaining agreement may nevertheless find itself under continuing obligations implied from the agreement. Unions in a number of cases have successfully asserted that irrespective of the legality of the move itself, rights defined by the agreement survive removal.<sup>58</sup>

*Construction of the Contract*

A. Recognition and description clauses.

A substantial number of courts and arbitrators have considered whether recognition or description clauses<sup>59</sup> import a geographical limitation on the efficacy of the contract. A recital in the agreement in *Zdanok v. Glidden Co.*<sup>60</sup> that it was made "for and on behalf of its plant facilities located at [street and city address]"<sup>61</sup> was held to be mere *descriptio personae*, and the company's contention that this recital prevented the contract from conferring enforceable rights upon the employees at any location other than the one named therein was overruled.<sup>62</sup> However, in *Oddie v. Ross Gear & Tool Co.*<sup>63</sup> the court construed a contract in which the company recognized the union

as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit

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way Stores, Inc., 42 Lab. Arb. 353, 357 (1964); Sivyer Steel Casting Co., 39 Lab. Arb. 449, 455-56 (1962); Facile Corp., 18 Lab. Arb. 781, 784 (1952).

<sup>58</sup> Seniority rights, specifically the right to recall, are most frequently at issue in cases of this kind.

<sup>59</sup> The recognition clause is normally accompanied by a phrase or sentence, herein called the description clause, setting forth the location of the plant where the members of the bargaining unit are employed at the time the agreement is entered into.

<sup>60</sup> 288 F.2d 99 (2d Cir. 1961), *aff'd on other grounds*, 370 U.S. 530 (1961). The decision reversed the district court, *Zdanok v. Glidden Co.*, 185 F. Supp. 441 (S.D.N.Y. 1960), and was considered by the Supreme Court only with regard to the issue of whether participation by a judge of the Court of Claims would compel reversing the court of appeals decision.

<sup>61</sup> 288 F.2d at 103.

<sup>62</sup> The court stated that the employees had "'earned' their valuable unemployment insurance, [seniority rights] and that their rights in it were 'vested' and could not be unilaterally annulled." *Ibid.* For analyzes of the concept of vested seniority rights, compare Blumrosen, *Seniority Rights and Industrial Change: Zdanok v. Glidden Co.*, 47 MINN. L. REV. 505 (1963) (favorable), with Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962) (critical).

<sup>63</sup> 305 F.2d 143 (6th Cir. 1962), *cert. denied*, 371 U.S. 941 (1962). The decision reversed *Oddie v. Ross Gear & Tool Co.*, 195 F. Supp. 826 (E.D. Mich. 1961).

area within the city limits of Detroit for the purpose of collective bargaining. . . .<sup>64</sup>

The union's argument that this language was merely a reference to where the company was then located was rejected.<sup>65</sup> The court distinguished *Zdanok* on the ground that in that case there was "a specific reference to one plant only, the address of which was specifically given, and there was no specific geographical limitation such as is contained in the agreement in the present case."<sup>66</sup>

Most arbitrators who have considered the question have avoided attempts to discriminate on the basis of subtle differences in wording, but rather have simply disagreed with one another.<sup>67</sup> Without specifically stating that a recognition or description clause imports no geographical restriction, several other cases have held that a labor contract may have effect elsewhere than at the situs named therein.<sup>68</sup>

## B. Management rights clause.

The typical management rights clause by its terms imposes no limitation on the survival of union employee rights. In fact, in *Lion Match Co.*<sup>69</sup> a management rights clause was held to imply that union rights were intended to survive relocation. A part of the clause expressly provided that the company should have the exclusive right to determine the location of the plant and equipment. The arbitrator reasoned that if the possibility of removal had not been contemplated there would have been no need for such a man-

<sup>64</sup> 305 F.2d at 147.

<sup>65</sup> The union's position, said the court, "ignores the fact that the reference is not to the employees of the . . . Company but to the Company's employees 'in its plant or plants' within the city limits of Detroit. . . . The fact that the beneficiaries of the contract are specifically designated as the employees in all of the Company's plants within the city limits of Detroit instead of merely the employees of the . . . Company in Detroit makes it plain that the words were not used for the purpose of merely giving the present location of the . . . Company." *Id.* at 149.

<sup>66</sup> *Ibid.* The distinction seems specious because the issue of whether there was a "specific geographical limitation" was the very issue considered in both the *Zdanok* and *Oddie* cases.

<sup>67</sup> For cases supporting the union's position, see *Safeway Stores, Inc.*, 42 Lab. Arb. 353 (1964); *Lion Match Co.*, 40 Lab. Arb. 1 (1963). For cases supporting management's view, see *Phillips Chem. Co.*, 39 Lab. Arb. 82 (1962); *United Packers, Inc.*, 38 Lab. Arb. 619 (1962). In *H. H. Robertson Co.*, 37 Lab. Arb. 928 (1962), it was held that the circumstances under which the contract was negotiated constituted some evidence that a geographical restriction was intended.

<sup>68</sup> *Metal Polishers Union v. Viking Equip. Co.*, 278 F.2d 142 (3d Cir. 1960); *Johnson v. Archer-Daniels-Midland Co.*, 203 F. Supp. 636 (E.D. Mich. 1962); *American Mach. & Foundry Co.*, 16 Lab. Arb. 95 (1950).

<sup>69</sup> 40 Lab. Arb. 1 (1963).

agement rights provision. Having decided that the possibility of removal was clearly contemplated, the arbitrator held that if termination of the contract was intended in the event that removal was accomplished, it would have been logical to so provide. Absent a provision to that effect, it was assumed that the parties intended that the contract remain effective at the new location.<sup>70</sup>

### C. Seniority clause.

The unique case of *H. H. Robertson Co.*<sup>71</sup> arose when the company removed a small part of its equipment from a plant in Pennsylvania to a new plant in California. Prior to this move the company had more than one plant. Seniority rights in the plant in which the grievance arose were described in the contract as to length of service within the plant, department, or position. The arbitrator held that the contract's structuring of seniority rights on a plant-wide rather than a firm-wide basis was evidence that these rights were intended to exist only at the Pennsylvania location.<sup>72</sup>

### *Extra-contractual Factors*

#### A. Commingling of work.

When an employer transfers operations to already existing facilities, resulting practical problems may prevent the agreement from governing work at the new location. In *Safeway Stores, Inc.*<sup>73</sup> the grievants were laid off when the office machines which they operated were transferred to another established plant. The machines were there used to perform additional work as well as that previously done by the grievants. The arbitrator found that the work which had previously been the responsibility of the grievants had become inextricably commingled with other functions, and that since the

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<sup>70</sup> *Id.* at 5. *Lion* should be a disturbing case to employers who feel that, by virtue of having expressly gained or reserved the exclusive power to determine the location of plants, they have freedom to seek through plant removal more skilled or, perhaps, cheaper labor. Employers, therefore, might find the following to be a more plausible view of the *Lion* agreement: since the union would have no reason to object to a plant transfer which caused the union no detriment, it would be superfluous to provide in the contract that management might initiate such a non-detrimental move. Thus, the provision must be intended to give the employer the right to remove even though such action causes harm to the union.

<sup>71</sup> 37 Lab. Arb. 928 (1962).

<sup>72</sup> *Id.* at 932. The arbitrator also held that the clause describing the location of the plant implied a geographical limitation of the effectiveness of the contract. *Ibid.*

<sup>73</sup> 42 Lab. Arb. 353 (1964).

work no longer existed as a separate entity, it could not be restored to the bargaining unit.<sup>74</sup>

*Phillips Chem. Co.*<sup>75</sup> arose when an employee was laid off pursuant to the company's plan to centralize its business machine operations by consolidating into a single unit the work of nine. The grievant, a member of one of the nine old units, sought to follow the work under the seniority provision of the labor contract. In finding for the employer, the arbitrator held that the work transferred to the center could not be said to belong only to the unit of which the grievant was a member, but rather to all nine units, and to none of them individually on a pro rata basis. Each of the nine units had been covered by a separate collective bargaining contract. Since amalgamation of all these contracts to produce a single hierarchy of seniority was deemed impossible, the grievant was held to possess no surviving seniority rights.<sup>76</sup>

#### B. Geographical distance of the move.

Basing their arguments on the recognition and description clauses, courts and arbitrators have disagreed on the issue of whether operation of the collective bargaining agreement is geographically restricted.<sup>77</sup> In every such case the tribunals purported to be seeking the intent of the parties. It is noteworthy, however, that of the eight cases stating that the ordinary description clause imports no geographical restriction,<sup>78</sup> only one involved a move to a location more than one hundred miles from the original plant site.<sup>79</sup> In six of the remaining seven cases the move was a local one,<sup>80</sup> and in none

<sup>74</sup> *Id.* at 356-57. Compare *Sivyer Steel Casting Co.*, 39 Lab. Arb. 449 (1962), in which employees were held not entitled to rehiring according to their seniority when the company moved its facilities from one plant to two others covered by contracts with unions other than the one representing the grievants. *Id.* at 462.

<sup>75</sup> 39 Lab. Arb. 82 (1962).

<sup>76</sup> *Id.* at 84; cf. *Panza v. Armco Steel Corp.*, 208 F. Supp. 50, 53 (W.D. Pa. 1962), *aff'd*, 316 F.2d 69 (3d Cir.), *cert. denied*, 375 U.S. 897 (1963).

<sup>77</sup> See text accompanying notes 58-68 *supra*.

<sup>78</sup> *Zdanok v. Glidden Co.*, 288 F.2d 99 (2d Cir. 1961); *Metal Polishers Union v. Viking Equip. Corp.*, 278 F.2d 142 (1960); *Panza v. Armco Steel Corp.*, 208 F. Supp. 50 (W.D. Pa. 1962), *aff'd per curiam*, 316 F.2d 69 (3d Cir.), *cert. denied*, 375 U.S. 897 (1963); *Johnson v. Archer-Daniels-Midland Co.*, 203 F. Supp. 636 (E.D. Mich. 1962); *Safeway Stores, Inc.*, 42 Lab. Arb. 353 (1964); *Lion Match Co.*, 40 Lab. Arb. 1 (1963); *International Harvester Co.*, 24 Lab. Arb. 332 (1955); *American Mach. & Foundry Co.*, 16 Lab. Arb. 95 (1950).

<sup>79</sup> In the *Johnson* case, *supra* note 78, the move was from Wyandott, Michigan to Peoria, Illinois.

<sup>80</sup> In *Zdanok*, *supra* note 78, the only case among these seven in which the move was clearly not a local one, the firm moved from Elmhurst, Long Island to Bethlehem, Pennsylvania.

was work or equipment transferred out of a well-defined trading area. On the other hand, of the six cases finding a geographical restriction, four of the removals were of great distance and to separate geographic-economic areas.<sup>81</sup> Moreover, in the two cases not involving long-distance moves there were other weighty reasons for holding in favor of the employer.<sup>82</sup> Since few of the decisions refer specifically to the distance of the move, the significance of these facts is necessarily conjectural.<sup>83</sup> It would be consistent with the decisions, however, to conclude that the distance of the transfer is a compelling decisional factor. Courts and arbitrators may believe that as a general rule a labor agreement will remain effective following removal, but only if the removal is not of great distance. Such a belief may represent merely an adverse reaction to the assertion that a contract created to govern relationships in one area should be effective at a place far removed from that area. On the other hand, it may be felt that a reasonable compromise between the competing demands of employer and employees would consist in enforcement of the latter's claim to the right to recall if the move is not beyond commuting distance.<sup>84</sup>

#### CONCLUSION

This study unearths no consistent decisional pattern. The law surrounding plant removal consists of divergent and often irreconcilable holdings accepting, rejecting, or qualifying assertions of implied limitations on the rights of firms to remove their facilities. There is no certain answer as to whether a recognition clause implies

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<sup>81</sup> *Oddie v. Ross Gear & Tool Co.*, 305 F.2d 143 (6th Cir. 1962) (move from Detroit to Tennessee); *Bradley v. Sangamo Elec. Co.*, 51 L.R.R.M. 2375 (Ill. Cir. Ct. 1962) (move from Illinois to South Carolina), *vacating Bradley v. Sangamo Elec. Co.*, 50 L.R.R.M. 2828 (Ill. Cir. Ct. 1962); *Phillips Chem. Co.*, 39 Lab. Arb. 82 (1962); *Sivyer Steel Casting Co.*, 39 Lab. Arb. 449 (1962); *United Packers, Inc.*, 38 Lab. Arb. 619 (1962) (move from Chicago to Louisiana); *H. H. Robertson Co.*, 37 Lab. Arb. 928 (1962) (move from Pennsylvania to California).

<sup>82</sup> These cases were *Sivyer Steel Casting Co.* and *Phillips Chem. Co.* where commingling of the grievants' work with work in preexisting facilities was held to limit the right to recall. See note 74 *supra* and text accompanying notes 75-76

<sup>83</sup> *But see Zdanok v. Glidden Co.*, wherein the court stated that few would seriously argue that "if the plant moved from 94th Street to 93rd Street in Elmhurst, an entire structure of legal rights would tumble down." 288 F.2d 99, 103 (2d Cir. 1961). The move in *Zdanok* was from Elmhurst, Long Island to Bethlehem, Pennsylvania, a distance of about 100 miles.

<sup>84</sup> The cases, as shown above, are not absolutely consistent with this analysis. However, to the extent that the analysis is valid, the ostensible attempt to determine the parties' intent as to the geographical efficacy of the agreement would seem to be merely ritualistic obeisance to a traditional canon of contract construction.

a promise that the work of the bargaining unit will not be reduced; nor is it clear that if the clause sets forth the plant's location, the necessary implication is that the rights and duties created by the contract can exist only at that location; another open question is whether a firm may relocate a plant only if it is operating in the red but not if it is making a large or even a meagre profit.

An explanation of this apparent lack of consistency may be that orthodox rules of contract construction are inadequate to resolve questions arising under collective bargaining agreements.<sup>85</sup> A collective bargaining agreement is, in a very real sense, not a voluntary one; the parties must agree with one another, for they have no one else with whom to deal. Failure of a particular firm and a particular union to come to terms entails frustration of the objectives of both parties. Thus, if one party places upon some term or clause a construction which it knows the other does not or will not willingly accept, the choice is not simply between failing to insist upon that construction and finding a different party with whom to deal; the alternative to the withdrawal of one party's proffered construction may be costly deadlock. Consequently,

the pressure to reach agreement is so great that the parties are often willing to contract although each knows that the other places a different meaning upon the words and they share only the common intent to postpone the issue and take a gamble upon an arbitrator's ruling if decision is required.<sup>86</sup>

This fact indicates not only the necessity for recognition of implied terms in labor contracts but also the inadequacy of traditional canons of contract construction. In theory, contract interpretation is a matter of finding the manifest intent of the parties. However, the exigencies of the collective bargaining process may well induce a party to a labor contract not to make his intent manifest;<sup>87</sup> hence tribunals are not infrequently called upon to construe contract clauses which are reasonably susceptible of clearly contradictory interpretation. Were a court or arbitrator in such a case merely to state that according to the rules of contract construction there is no discernable intent, hence no agreement, and that the issue must

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<sup>85</sup> See Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

<sup>86</sup> Cox, *Reflection Upon Labor Arbitration*, *supra* note 85 at 1491.

<sup>87</sup> See text accompanying note 29 *supra*.

therefore be negotiated, the parties would be subjected to precisely the risks they may have sought by silence to avoid. The parties may simply not desire that the court or arbitrator seek out intent. It may be, rather, that "in the last analysis, what is sought is a wise judgment. It is judgment, said Holmes, that the world pays for."<sup>88</sup>

Viewed in the light of the collective bargaining situation, then, seemingly inconsistent holdings relating to implied restrictions on plant removal need not cause alarm. If the parties to collective bargaining agreements have in fact intrusted to arbitrators and courts the resolution of conflicts which are too costly for them to resolve by themselves, then there will be cause for concern only if one or both parties lose confidence in the tribunals.<sup>89</sup>

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<sup>88</sup> Shulman, *Reason, Contract, and Law in Labor Relations*, *supra* note 85, at 1016. *But cf.* Doolan, *Reserved Rights in Labor Arbitration: A Management View*, N.Y.U. 12TH ANNUAL CONFERENCE ON LABOR 211, 222-23: "Generally, employers are prone to insist on tight contract language. They are not prone to provide a field day for the loose constructionist."

<sup>89</sup> There has been at least some criticism from each side as to the extent to which the implied limitations theory has been accepted. *Compare* Fairweather, *Implied Restrictions on Work Movements—The Pernicious Crow of Labor Contract Construction*, 38 NOTRE DAME LAW. 518 (1963), *with* Vladeck, *Comment*, 16 IND. & LAB. REL. REV. 218 (1963). This may indicate a healthier state of affairs than would the existence of one-sided criticism accompanied by one-sided satisfaction.